Exxonmobil Exploration and Production Malaysia Inc v Kesatuan Pekerja-Pekerja Exxonmobil Exploration and Production Malaysia Inc & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1-25-191 OF 2003

RAUS SHARIF J

12 JULY 2004

Administrative Law — Remedies — Certiorari — Application quash decision of Industrial Court — Whether decision tainted with irregularities

Labour Law — Industrial Court — Jurisdiction — Complaint of non-compliance — Whether court seized with jurisdiction to hear matter — Whether complaint involved was a trade dispute or application for interpretation

The applicant applied to this court for a certiorari to quash the decision of the Industrial Court in deciding to hear the complaint of non-compliance lodged by the union (the first respondent) under s 56 of the Industrial Relations Act 1967 ('the Act') without first hearing and determining the application for interpretation of article 45 of the collective agreement.

Held, allowing the application:

(1) The real issue before the Industrial Court was the interpretation of article 45 of the collective agreement read with s 6 of the Act and the application for leave form set out in the Fourth Schedule. This was a trade dispute between the employee and the union which is connected with the terms of the employment of the workmen who are eligible to union leave and should be resolved through the trade dispute resolution process as provided by ss 18 and 26 of the Act. Thus, the first respondent should not have lodged a complaint of non-compliance under s 56 of the Act. This is because s 56 is a summary enforcement procedure for clear cut cases of non-compliance of a term of an award or collective agreement (see paras 11, 13 and 14).

(2) The Industrial Court has no jurisdiction to hear the complaint of non-compliance under s 56 of the Act as the matter should have proceeded either as a trade dispute or an application for interpretation (see para 20).

[**Bahasa Malaysia summary**

Pemohon telah memohon ke mahkamah ini untuk perintah certiorari untuk membatalkan keputusan Mahkamah Perusahaan dalam memutuskan untuk membicarakan aduan ketidakpatuhan di bawah s 56 Akta Perhubungan Perusahaan ('Akta tersebut') tanpa mendengar atau memutuskan permohonan untuk penterjemahan artikel 45 perjanjian bersama terlebih dahulu.

Diputuskan, membenarkan permohonan itu:

(1) Isu sebenar di hadapan mahkamah Perusahaan melibatkan interpretasi artikel 45 perjanjian bersama dibaca bersama s 6 Akta tersebut dan borang permohonan cuti seperti yang terkandung dalam jadual ke-empat. Ini adalah satu pertikaian perdagangan di antara pekerja dan kesatuan yang berkait dengan terma-terma pekerjaan pekerja yang berhak kepada cuti kesatuan dan seharusnya diputuskan melalui proses penyelesaian pertikaian perdagangan di bawah ss 18 dan 26 Akta tersebut. Oleh itu, responden pertama tidak sepatutnya membuat aduan ketidakpatuhan di bawah s 56 Akta tersebut. Ini adalah kerana s 56 merupakan prosedur penguatkuasaan terus untuk kes-kes yang jelas menunjukkan ketidakpatuhan suatu terma award atau perjanjian bersama (lihat perenggan 11, 13 and 14).

(2) Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk membicarakan aduan berkenaan di bawah s 56 Akta tersebut kerana ia sepatutnya diteruskan sebagai suatu pertikaian perdagangan atau permohonan untuk interpretasi (see para 20).]

Notes

For cases on certiorari generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 185–393

For cases on jurisdiction of Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1323–1375

Cases referred to

Dragon & Phoenix Bhd v Kesatuan Pekerja-pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor [1991] 1 MLJ 89 (refd)

Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor [1987] 2 MLJ 81 (refd)

Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers [1988] 1 MLJ 306 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 3 MLJ 217, CA (refd)

Legislation referred to

Industrial Relations Act 1967 s 6, 18, 26, 56

Lim Heng Seng (Peter Chater with him) (Lee Hishamuddin) for the appellant
R Sivarasa (Daim & Gamany) for the respondent

Raus Sharif J:

[1] This is an application by Exxonmobil Exploration and Production Malaysia Inc (the applicant) for an order for certiorari to quash the decision of the Industrial Court handed down on 29 August 2003. The decision was in respect of the dismissal of an oral application made by the applicant for a direction of the Industrial Court that the Industrial Court ought not to

hear the complaint of non-compliance by the union (the first respondent) without first hearing and determining the application for interpretation of article 45 of the collective agreement.

[2] Briefly, the material facts in respect of the disputes between the applicant and the first respondent which led to the application by the applicant are as follows.

[3] The applicant and the first respondent entered into a collective agreement dated 29 November 2001. The Industrial Court has taken cognisance of the collective agreement. The collective agreement made provision regarding union leave as follows:

> Article 45 – LEAVE FOR UNION BUSINESS (FOURTH SCHEDULE)
>
> Leave for Union business shall be in accordance with the Industrial Relation Act, 1967.
>
> Such leave application shall be submitted on the form as shown in the Fourth Schedule for prior approval.

[4] The Fourth Schedule of the collective agreement provides the applicant with the discretion whether to approve or not to approve the application for leave and, if approved, whether with or without pay.

[5] On 2 December 2002, some of the employees of the applicant who were EXCO members of the first respondent applied for union leave to attend the EXCO meeting on 12 December 2002. However the EXCO members did not submit the application for union business leave in the form set out in the Fourth Schedule of the collective agreement.

[6] The applicant granted conditional approval to the application, the same being subject to both operational constraints and the application by the said employees in the prescribed form set out in the collective agreement, if they were scheduled to work. On 9 December, 2003, the applicant notified to Zulakmal bin Omar, an officer of the first respondent that due to operational constraints he could not be released to go on union business leave. The said Zulakmal bin Omar was the key technician in the recommissioning of the Lawang Platform Project.

[7] The first respondent being dissatisfied with the applicant's decision filed a complaint of non-compliance to the Industrial Court. The applicant raised a preliminary objection when the complaint of non-compliance came up for hearing on 16 June 2003 on the ground that the first respondent did not comply with the grievance procedure set out in the collective agreement prior to filing the complaint of non-compliance. The Industrial Court reserved its ruling on the preliminary objection until the end of the trial of the complaint of non-compliance and proceeded with the trial by hearing the first respondent's case. The first witness for the first respondent, one Zulakmal bin Omar gave his evidence-in-chief. The matter was part-heard and the Industrial Court fixed the same for continued hearing on 29 August 2003. During the interval, the applicant changed its solicitors in respect to the conduct of the matter. Upon the advice of the solicitors, the applicant

filed the following prior to the continued trial date of the non-compliance application:

a. Application for interpretation of Article 45 of the collective agreement;

b. Complaint of non-compliance with Article 45 of the collective agreement by the first respondent; and

c. A report of trade dispute between the applicant and the first respondent in respect of the implementation and application of Article 45 of the collective agreement to the Director General of Industrial Relations.

[8] Accordingly, the counsel of the applicant applied to stay the trial of the complaint of non-compliance pending the determination of the application for interpretation of article 45 of the collective agreement filed by the applicant. The Industrial Court after hearing the submissions of both counsel for the applicant and the first respondent refused to grant the application to stay the trial. The Industrial Court decided that the hearing of the non compliance application ought to be proceeded with.

[9] The issue raised was whether the first respondent should have lodged a complaint of non-compliance under s 56 of the Industrial Relations Act 1967 (the Act) thus involving the enforcement jurisdiction of the Industrial Court rather than proceeding with the matter as a trade dispute under s 26 of the Act. Having not done so, the applicant then took the initiative to report such a dispute and the issue now becomes whether the Industrial Court ought to have proceeded to hear the application rather than proceed with the first respondent's application for enforcement.

[10] As stated earlier, the real matter in dispute between the applicant and the first respondent concerns union leave as provided in article 45 of the collective agreement. According to article 45, that leave for union business shall be in accordance with the Act. The section of the Act that governs leave for union business is s 6 which reads as follows:

> A workman intending to carry out his duties or to exercise his rights as an officer of a trade union shall in writing to his employer for leave of absence stating the durations of and the purposes for which such leave is applied for is for a period that is no longer than what is reasonably required for the purposes stated in the application.
>
> Provided that a workman shall not be entitled to leave with pay for the duration of his absence if the purposes for which he is absent from work are not to represent the members of his trade union in relation to industrial matters concerning his employer.

[11] The applicant contends that s 6 of the Act requires a workman who is an officer of the union to apply for leave from the applicant when he intends to carry out his duties or to exercise his rights as an officer of the union. The applicant further contends that in recognition of the requirement to obtain leave of absence from the applicant, the collective agreement provides that leave shall be applied for pursuant to article 45 in

the form set out in the Fourth Schedule. The application contends that article 45 of the collective agreement vests in the management of the applicant the discretion whether to approve the leave or otherwise subject to operational constraints of the applicant, inter alia, manning requirements and safety considerations of the applicant. Section 6 of the Act is to be read consonantly with article 45 of the collective agreement and the terms of the Fourth Schedule. The applicant also states that due to the peculiarities of the upstream production activities in the oil and gas industry which require 24-hour off-shore operation, there has been an established practice between the applicant and the first respondent that the applicant will first evaluate and ascertain its operational constraints before any release of its employee who as an officer of the first respondent chooses to attend to union business on his workday.

[12] The first respondent on the other hand, relying on s 6 of the Act contends that so long as the duration of the leave for union business applied for is for a period that is no longer than what is reasonably required for the purposes stated in the application, the applicant must grant leave with pay. This, the union says, is due compliance with article 45. The union also contends that the application's reliance on operational requirements is in breach of the collective agreement.

[13] I am of the view that the matter before the court is a trade dispute. This is a case involving a dispute between the employee and the union which is connected with the terms of the employment of the workmen who are eligible to union leave. The dispute ought to be resolved through the trade dispute resolution process as provided by ss 18 and 26 of the Act.

[14] Thus, the first respondent should not have lodged a complaint of non compliance under s 56 of the Act. This is because s 56 of the Act is a summary enforcement procedure for clear cut cases of non-compliance of a term of an award or collective agreement. In *Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306, Seah SCJ dealt with the proper exercise of this jurisdiction and the function of the Industrial Court as follows:

> Now, s 56 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a collective agreement which has been taken cognizance of by the court under s 17 after a complaint has been lodge as to its non-compliance. The non-compliance of a term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its powers contained in subsection (2) thereof. It is therefore, a condition precedent to the exercise of those powers that there should be in existence a breach or non-observance of a term of the award or collective agreement. This must be satisfactorily established by the complainant ...

[15] The clear distinction between the interpretative and enforcement jurisdiction and function was expressed by the learned judge as follows:

> In my judgement, under s 56 of the Act, the Industrial Court is charged with the enforcement of an award or collective agreement which has taken cognizance of by the court after a complaint has been received alleging non-compliance with

one or more terms of the award or said collective agreement. On the authority of *Federal Hotel Sdn Bhd v National Union, Bar & Restaurant Workers* [1983] 1 MLJ 175, the Industrial Court is not charged with the duty of interpreting or adjudicating the term or terms of an award or collective agreement which are disputed by the contracting parties concerned. Section 33 provides for this and the legislature has laid down certain procedures to be followed when a complaint is made pursuant to this section. The function of the Industrial Court under section 33 can only be exercised on a deficit application made for that purpose (see the *Federal Hotel* case). In other words, any question of interpretation or adjudication of a term of an award or collective agreement is not within the scope of section 56.

[16] The Supreme Court in *Dragon & Phoenix Bhd v Kesatuan Pekerja-pekerja Perusahaan Membuat Textil dan Pakaian Pulau Pinang & Anor* [1991] 1 MLJ 89 reiterates the distinction between the interpretative function and the enforcement function of the Industrial Court, Harun Hashim SCJ propounded as follows:

> In a complaint of non-compliance with any term of a collective agreement or award under s 56 of the Industrial Relations Act 1967, the Industrial Court should, as the general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is a purely enforcement function. It should not embark on an expedition of examine the provision of the Employment Act 1955 in order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would invoke the interpretative function of the court under section 33 of the Industrial Relation Act 1967 which is an entirely different exercise from that under s 56. It is important to recognize the difference between these two functions of the court because failure to comply with an order under section 56 is an offence with penal provisions whereas there are no such consequences in respect of a matter dealt with under s 33. It is also important to separate the two functions in order to determine which particular jurisdiction the Industrial Court is exercising in any particular case. It may well be that in a dispute such as in the present case there should have been two separate applications to the court, the first under section 33 to invite the court to exercise its interpretative function and if there is still non-compliance, a second application for enforcement under section 56.

[17] In *Syarikat Kenderaan, Melayu Kelantan Bhd v Transport Workers' Union* [1995] 3 MLJ 217, the Court of Appeal citing the case of *Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81, reiterated the principle that recourse to s 56 was the proper course to take in a clear and uncontroverted case of mere non-compliance with a term of an award or collective agreement taken cognisance of by the Industrial Court. Notwithstanding the above however, the Court of Appeal suggested by way of obiter dicta that there might well be an overlapping of the two jurisdictions and functions. Gopal Sri Ram JCA put the matter succinctly as follows:

> The dissenting judgement of Wan Sulaiman SCJ in *Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar & Restaurant Workers* [1988] 1 MLJ 306 correctly recognizes that s 33(1) and 56 cannot be treated as being housed in a water tight compartment with no permissible overlap under any circumstances. The power of

the court to interpret an award or a collective agreement which has been taken cognizance of cannot, to borrow the mere description language of Macbeth, be 'cabin'd, cribb'd and confined'.

Accordingly, in my judgement, the question whether the court, when entertaining a complaint under section 56 of the Act has indeed acted in excess of its jurisdiction by exercising its powers under s 33(1), is one that depends upon the peculiar circumstances of a particular case.

There may be circumstances, such as those as existed in *Federal Hotel v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175, which may warrant a superior court forming the view that an error of law has been occasioned by the court's unwarranted transgression of the power of interpretation when exercising its power of enforcement. On the other end of the scale, there may be cases in which an interpretation of an award or collective agreement is asine qua non to ascertain whether there has indeed been non-compliance of the same. To say that in such circumstances the complaint is to be summarily driven away from the judgment seat because a question of interpretation has arisen, is to nullify legislative intent, namely, the expeditious settlement of industrial disputes. It follows therefore, that the extreme proposition that the court, when considering a complaint under s 56(1), may never interpret an award or collective agreement in any circumstances is fallacious and not worthy of a second glance.

[18] It can be seen that the Supreme Court has carefully and cogently set out in *Holiday Inn* and *Dragon & Phoenix* the clear line to be drawn between the enforcement jurisdiction and the interpretation jurisdiction. This line has been made somewhat fuzzy by the Court of Appeal in its decision in *Syarikat Kenderaan, Melayu Kelantan Bhd v Transport Workers' Union* [1995] 3 MLJ 217, CA. But, I am of the view even if we take into account the attempt at watering down the effect of the Supreme Court in *Holiday Inn* and *Dragon & Phoenix*, the decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd* will have the effect that recourse to s 56 is only permitted in 'clear and uncontroverted case of mere non compliance.'

[19] Thus, turning back to the instant case, the question that needs to be asked is whether the matter before the Industrial Court is a clear and uncontroverted case of mere non-compliance. With respect, on the facts of this case, the matter is not a clear and uncontroverted case of mere non compliance. To me, the real issue before the Industrial Court was the interpretation of article 45 of the collective agreement read with s 6 of the Act and the application for leave form set out in the Fourth Schedule. It follows that the first respondent ought not to have made a complaint under s 56 of the Act alleging non compliance when its interpretation of the said article, section and form was disputed by the applicant. The interpretation of article 45 concerns the question whether the granting of union business leave is as of right or whether it is subject to the discretion of the applicant, taking into consideration its operational constraints, inter alia its manning requirements and safety considerations. In coming to its conclusion on the interpretation of article 45 it is not sufficient that the Industrial Court merely examine the word, 'shall' appearing in article 45 of the collective agreement and s 6 of the Act, or to construe the terms of the Fourth Schedule. It will require the Industrial Court to embark for an extended

exercise of interpretation of the article of the collective agreement and s 6 of the Act together with the prescribed form set out in the Fourth Schedule of the collective agreement which the Industrial Court does not have the jurisdiction to do in a complaint of non-compliance lodged under s 56 of the Act.

[20] In conclusion, I am of the view, on the facts of this case, that the Industrial Court has no jurisdiction to hear the complaint of non-compliance under s 56 of the Act as the matter should have proceeded either as a trade dispute or an application for interpretation. Clearly, there is an error of law on the part of the Industrial Court. Accordingly, the applicant's application to quash the decision of the Industrial Court, dismissing the applicant's preliminary objection, and an order quashing the first respondent's complaint of non-compliance, is allowed with costs.

Application allowed with costs.

Reported by AG Kalidas